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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS

THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

For the past six years, the wireless cable industry has been urging the Commission and Congress to assure that wireless cable operators have full and fair access to the video programming that consumers demand from their multichannel video programming distributors. Historically, the wireless cable industry's efforts have focused on access to non-broadcast cable programming services such as Turner Network Television, ESPN, regional sports networks and the like -- services that succumbed to pressure from the cable monopoly and either refused to deal with alternative distribution technologies or charged exorbitant rates. Until passage of The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), the availability of popular broadcast programming to alternative technologies was not a concern. Those wireless cable operators that engaged in the retransmission of broadcast programming could do so freely, without fear of interference from the cable monopoly.

With the 1992 Cable Act, Congress has responded favorably to the complaints lodged by the wireless cable industry and other competitors to cable. With Sections 12 and 19, Congress has sought to assure the viability of competition in the marketplace by vesting the Commission with authority to provide substantial relief against the historic anticompetitive behavior of the cable monopoly. However, in crafting Section 6 of the 1992 Cable Act -- the retransmission consent provision -- Congress has inadvertently opened a Pandora's Box for the wireless cable industry and other competitive local distribution technologies. For the first time, wireless cable operators will be required to secure the consent of any broadcaster whose signal is being retransmitted. That, it must be stressed, is not the problem -- WCA has no objection to negotiating with broadcasters in a competitive marketplace. Because the local distribution marketplace is not yet competitive, however, the Commission must assure that the cable monopoly does not transmogrify retransmission consent into a weapon against emerging competition.

Specifically, WCA fears that cable operators will leverage their local monopoly to secure exclusive retransmission agreements with broadcasters or include in retransmission agreements provisions that would require the broadcaster to discriminate against emerging competitors with respect to price or any other terms or conditions governing retransmission. Because broadcast signals remain the most popular fare on multichannel video distribution systems, it is essential that wireless cable operators have a full and fair opportunity to secure distribution rights. Unless the Commission takes action here to prevent cable from abusing its local monopoly until a competitive marketplace develops, the viability of wireless cable systems that must engage in retransmission is threatened.

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The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules,[1] hereby submits its initial comments in response to the *Notice of Proposed Rule Making* ("NPRM") commencing the captioned proceeding.[2] For the reasons set forth below, WCA urges the Commission to bar cable television systems from exerting the monopoly power they possess in most communities to either extract exclusive retransmission consent agreements from local broadcasters or require local broadcasters to discriminate against emerging competitors as to price or any other terms or conditions governing retransmission for ten years. This is a matter of utmost importance to wireless cable and other newly-emerging competitive technologies -- failure by the Commission to do as

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[1]47 C.F.R. § 1.415 (1992).

[2]*Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, FCC 92-499, MM Docket No. 92-259 (rel. Nov. 19, 1992)[hereinafter cited as "*NPRM*"].

WCA recommends surely will sound the death knell for competition to cable in many communities across America.

I. INTRODUCTION.

In this proceeding, the Commission has solicited public comment on the adoption of rules and regulations implementing Sections 4, 5 and 6 of The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[3] relating to mandatory television broadcast signal carriage and retransmission consent. As the trade association of the wireless cable industry, WCA is vitally interested in the *NPRM*.[4] Because wireless cable systems are not "cable systems" for purposes of the Communications Act of 1934,[5] they are not subject to the "must-carry" provisions of Sections 4 and 5. However, the rules and regulations to be adopted by the Commission to implement Section 6 -- the retransmission consent provision of the 1992 Cable Act -- will have an immediate impact on WCA's members. Therefore, WCA will restrict its comments to the retransmission consent aspects of the *NPRM*.

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[3]Pub. L. No. 102-385, 102 Stat. 1460 (1992)[hereinafter cited as "1992 Cable Act"].

[4]WCA's members include wireless cable system operators, the licensees of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") facilities that provide transmission services to wireless cable system operators, programmers and wireless cable equipment manufacturers.

[5]*See Definition of A Cable System*, 5 FCC Rcd 7638, 7639-41 (1990), *reversed on other grounds sub nom.*, *Beach Communications v. FCC*, 965 F.2d 1103 (D.C. Cir. 1992), *cert. granted*, __ U.S.L.W. ____ (U.S. Nov. 30, 1992)(No. 92-603).

Section 6 amends the Communications Act of 1934 by adding a new Section 325(b). By its terms, Section 325(b) bars a "multichannel video programming distributor" as well as a "cable system" from retransmitting the signal of a commercial television broadcaster after October 5, 1993 without that broadcaster's consent. The 1992 Cable Act specifically defines "multichannel video programming distributor" to include "a multichannel multipoint distribution service"[6], a term Congress has used as synonymous with wireless cable.[7] Thus, WCA's members will be required to secure consent under new Section 325(b) when they engage in the retransmission of commercial television broadcast signals after October 5, 1993.[8]

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[6]*See* 1992 Cable Act, at § 2(c)(6)

[7]WCA agrees with the Commission's tentative conclusion that between the wireless cable system operator and any MDS or ITFS licensee providing a transmission service to that wireless cable system operator, the obligation of securing retransmission consent should fall on the wireless cable operator. *See NPRM, supra* note 2, at ¶ 42.

[8]As will be addressed below, wireless cable systems do not always retransmit local broadcast signals over their MDS and ITFS channels. *See infra* at 12. Rather, they often make local broadcast signals available to subscribers by receiving the signals off the air on a standard VHF/UHF antenna, which is then connected to the wireless cable set-top converter unit. In multiple dwelling units, the MDS and ITFS channels are often combined with the signals of broadcasters received off the air at the building rooftop, and relayed to subscribers through a master antenna system. In the *NPRM*, the Commission has inquired as to whether a master television antenna system requires retransmission consent. *See NPRM, supra* note 2, at ¶ 42. WCA does not believe that retransmission consent is required because no retransmission of the broadcast signal is occurring. Significantly, the Report of the Senate Committee on S. 12 clearly stated that "[B]roadcast signals will remain available over the air for anyone to receive without having to obtain consent." S. Rep. No. 102-92, 102d

(continued...)

At the outset, WCA must emphasize that it has no quarrel with Congress' effort to provide broadcasters with greater control over their signals. Like wireless cable operators, the broadcasters have suffered years of abuse at the hands of cable's local unregulated monopoly. WCA certainly hopes that in considering retransmission consent requests, most broadcasters will be fair to emerging competitors to cable, if only out of enlightened self-interest. A broadcaster that grants exclusive retransmission consent rights to the local cable monopoly or discriminates against emerging competitors in setting rates or other terms for retransmission consent may realize a short-term benefit. However, a broadcaster who does so ultimately could obliterate competition in its market and find itself no better off than it was prior to passage of the 1992 Cable Act -- in a buyer's market where there is only a single customer for its signal (the monopoly cable operator).

History has shown that whenever given a chance, cable operators will abuse the *de facto* monopoly they possess in the local marketplace to extract unwarranted concessions from program suppliers. Pressure from the cable monopoly on non-broadcast program suppliers has caused wireless cable operators to be denied access to cable

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[8](...continued)
Cong., 1st Sess. at 26 (1991)[hereinafter cited as "Senate Report"]. Thus, WCA believes that wireless cable systems are under no obligation to secure retransmission consent where they receive broadcast signals utilizing a VHF/UHF antenna at the subscriber's rooftop and merely relay the signal to the subscriber's set.

programming, and to pay excessive rates for much of the cable programming that is available. There should be no doubt, now that broadcasters have control over the retransmission of their signal by alternative technologies, that broadcasters will be subjected to the same pressures as cable programmers.

Simply put, there is now incentive and -- unless the Commission enacts prophylactic rules -- opportunity under new Section 325(b) for cable operators to extract exclusivity or discriminatory provisions in retransmission consent agreements from local broadcasters to the detriment of wireless cable and other emerging technologies. The combination of regulatory delays and cable's anticompetitive abuse has prevented wireless cable from gaining a material share of virtually any local market, leaving cable as the *de facto* monopoly. As a result, a broadcaster who opts for retransmission consent likely will find itself between Scylla of acceding to cable's demands for exclusivity or other preferential treatment and Charybdis of losing critical cable carriage.

II. DISCUSSION.

A. The Rules Adopted To Implement Retransmission Consent Must Not Undercut Congress' Overarching Goal Of Promoting The Emergence Of Competition.

Eight years ago, Congress passed The Cable Communications Policy Act of 1984 (the "1984 Cable Act") and, in the process, effected the most radical legislative change in United States communications policy since the Communications Act of 1934 was adopted fifty years earlier. Somehow convinced by the cable industry that new marketplace entrants were establishing a competitive environment, Congress chose to rely on marketplace forces rather than government to regulate the structure and behavior of the cable television industry.[9]

With the benefits of 20/20 hindsight, the hew and cry over rising cable rates, deteriorating service, self-serving program carriage decisions and anti-competitive conduct that followed in the aftermath of the 1984 Cable Act should have come as no surprise. The fundamental premise of the 1984 Cable Act -- that cable would be subject to effective competition -- proved faulty. As even the cable industry has been forced to concede,[10] in virtually every community in America cable possesses undue market power stemming from its *de facto* monopoly over the distribution of multiple channels of video programming. Indeed, once freed from any meaningful governmental oversight

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[9]*See, e.g.* H.R. No. 102-628, 102d Cong., 2d Sess., at 26 (1992)[hereinafter cited as "House Report").

[10]In seeking preferential tax treatment, Telecommunications, Inc., the largest cable television system operator in the United States, has candidly acknowledged that "a cable operator serving a city has a monopoly in the same sense that customers desiring cable service will have no choice regarding the provider of that service." Reply Brief of Telecommunications, Inc., *Telecommunications, Inc. v. I.R.S.*, 95 T.C. 36 (Nov. 7, 1990). Viacom International, Inc., another of the nation's largest operators of coaxial cable systems, conceded in a complaint filed with the United States District Court that "[e]ach cable operator is a monopolist in its local market or possesses a monopoly share approaching 100 percent." *Viacom International Inc. v. Time Incorporated*, Complaint, 89 Civ. 3139 (SDNY, filed May 9, 1989). Similarly, R.E. ("Ted") Turner, certainly one of the foremost authorities on cable television, has averred in a complaint filed with the United States District Court that cable operators exercise "monopoly power." *See Cable News Network, Inc. v. Satellite News Channel*, Civ. Act. File No. C83-430A, Complaint (N.D.Ga. filed Mar. 3, 1983).

by the 1984 Cable Act, the cable industry ran roughshod over potential competitors, reinforced its monopoly over the local distribution of multichannel programming by extracting concessions from programmers in exchange for carriage, and abused its market power to the detriment of consumers.[11]

With passage of the 1992 Cable Act, Congress acknowledged that the factual predicate for its 1984 deregulatory action was wrong -- cable continues to exercise undue market power as a result of its *de facto* monopoly. Indeed, Section 2(a)(2) of the 1992 Cable Act specifically provides that:

> most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. <u>The result is undue market power for the cable operator as compared to that of consumers and video programmers</u>.[12]

Despite Congress' recognition that it erred in 1984, the legislative history of the 1992 Cable Act makes it rather clear that Congress has not abandoned its

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[11]That abuse continues unabated today. Just last week, *Communications Daily* reported that a substantial number of year-end cable rate increases exceeded the national average growth of cable costs, and that cable rate increases during the past year were averaging 5%, while the consumer price index during the same period only rose 3%. *See* "Upward Trend Indicated By Latest Check Of Cable Rate Increases", *Communications Daily*, at 1 (Dec. 30, 1992).

[12]1992 Cable Act, at § 2(a)(2)(emphasis added). *See also, e.g.* House Report, *supra* note 9, at 30 ["the competition to cable system operators from other providers of video programming that the Committee anticipated during consideration of the 1984 Act, such as wireless and private cable operators, cable overbuilders, the home satellite dish market, and direct broadcast satellite operators, largely has failed to [emerge]"].

preference for competition over regulation. To the contrary, the 1992 Cable Act represents Congress' effort to rein in the cable industry by promoting the emergence of competition, while imposing interim regulation appropriate for a monopoly where a competitive marketplace has yet to develop. The Senate Committee on Commerce, Science, and Transportation (the "Senate Committee") stated in no uncertain terms in its Report on S.12 that "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace."[13] Similarly, the House Committee on Energy and Commerce (the "House Committee") made clear in its Report on H.R. 4850 that "[a] principal goal . . . is to encourage competition from alternative and new technologies, including competing cable system[s], wireless cable, direct broadcast satellites, and satellite master antenna television services."[14]

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[13]Senate Report, *supra* note 8, at 1. *See also id.* at 12 ["the Committee prefers competition to regulation"]; *id.* at 18 ["It has been the longstanding policy of the Committee to rely, to the maximum extent feasible, upon greater competition to cure market power problems"]; *id.* ["A cable system serving a local community, with rare exceptions, enjoys a monopoly. . . . This demonstrates the need to encourage competition . . .."]

[14]House Report, *supra* note 9, at 27. *See also id.* at 44 ["The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace."]; *id.* at 30 ["The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed."].

WCA believes that, if implemented in a manner consistent with Congressional intent, the 1992 Cable Act will yield a marketplace that is substantially more hospitable to wireless cable and other competitive multichannel video programming distributors than before.[15] As the Commission is well-aware from WCA's participation in MM Docket No. 89-600 and other proceedings regarding the structure of the cable industry, the most pressing problem facing wireless cable has been an inability to secure access on equitable terms and conditions to the non-broadcast programming services consumers demand from multichannel video programming distributors.[16] With the adoption of Sections 12 and 19 of the 1992 Cable Act, Congress has begun the process of addressing that problem. Unless the Commission falls prey to the inevitable entreaties by cable for implementing rules that undercut Congress' intent, Sections 12 and 19 should guarantee competitors access to many of the cable program services that are today not available on fair terms and conditions.

All of the good that the 1992 Cable Act could do for competition may be for naught, however, because of the unintended loophole Congress left in Section 6.

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[15]*See* "Cable Act Called 'Success' For Wireless Cable, Despite Loopholes", *Communications Daily*, at 2 (Dec. 2, 1992); Neel, "Wireless Update", *Cable World*, at 9 (Dec. 7, 1992).

[16]*See, e.g.* Comments of Wireless Cable Ass'n, MM Docket No. 89-600, at 39-57 (filed Mar. 1, 1990); Reply Comments of Wireless Cable Ass'n, MM Docket No. 89-600, 24-32 (filed April 2, 1990); Comments of Wireless Cable Ass'n, MM Docket No. 90-4, at 14 (filed April 6, 1990); Initial Comments of Wireless Cable Ass'n, MM Docket No. 82-334, at 17-18 (filed Oct. 24, 1988); Comments of Wireless Cable Ass'n, File Nos. 1038-1039-DSE-TC-88, at 8-9 (filed March 4, 1988).

Unless the Commission takes remedial action in this proceeding, Congress' goal of promoting local competition in the multichannel video programming distribution marketplace could be undermined by the opportunity for cable operators to abuse retransmission consent as a weapon against competition.

B. Wireless Cable Can Provide Meaningful Competition, But Only If It Can Provide Consumers With Ready Access To The Broadcast Signals They Demand.

In passing the 1992 Cable Act, Congress explicitly recognized that the wireless cable industry represents one of the most promising sources of competition to the current cable monopoly.[17] That should come as no surprise to the Commission. When the Commission first allocated spectrum for wireless cable almost a decade ago, it anticipated that wireless would provide much needed competition to the cable monopoly.[18] Since then, the Commission has frequently acknowledged that wireless cable is today "one of the most promising sources of multichannel competition in the local market."[19] Indeed, over the past two years the Commission has invested a

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[17]*See, e.g.* Senate Report, *supra* note 8, at 14-15; House Report, *supra* note 9, at 44-45.

[18]*See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 F.C.C.2d 1203, 1228 (1983); *Various Methods of Transmitting Program Material to Hotels and Similar Locations*, 99 F.C.C.2d 715 (1983).

[19]*See, e.g. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, FCC (continued...)

substantial amount of regulatory time and energy to modify the rules and policies governing wireless cable so as to promote its competitive potential.[20]

Wireless cable can be an effective source of competition to cable because, as the Commission has correctly noted, wireless cable can be a close substitute for cable television "in the nature of the programming it provides and its multichannel character."[21] The wireless cable industry has gone to great lengths to replicate the look and feel of a coaxial cable system, but without stringing unsightly wires on poles or digging up streets to bury expensive cable. Although designs vary from system to system, the typical wireless cable operator now employs some or all of the thirty-three

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[19](...continued)
89-600 at 20 (rel. Dec. 29, 1989). *See also, e.g. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971 (1990); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992); *American Television and Communications Corp.*, 4 FCC Rcd 4707 (1989). *See also* "Sikes: Competition's the Key to Changing Video Marketplace," *Cable World*, at 22 (Nov. 13, 1989).

[20]A full description of those efforts can be found at *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 n. 8 (1992).

[21]*Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971 (1990).

super high frequency ("SHF") channels allocated to the MDS and the ITFS to transmit programming services in coded form from a central headend to small antennas mounted on subscribers' rooftops.[22]

With respect to providing local broadcast signals to consumers, wireless cable operators have adopted two approaches. Where the local broadcast signals consumers demand are generally available throughout the wireless cable service area, those signals typically are received at each subscriber's home utilizing a standard VHF/UHF reception antenna. The VHF/UHF signals are then combined at the wireless cable set-top box with SHF signals received using a rooftop antenna. The set-top box under this scenario functions as a sophisticated electronic A/B switch.[23] This approach permits the subscriber to select for viewing from among all of the available channels utilizing his or her set-top box, without regard to whether the signal was transmitted utilizing VHF, UHF or SHF spectrum.[24]

However, experience has shown that the local broadcast signals demanded by consumers (and provided by cable) are not always readily available over the air

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[22]*See* "Wireless: Going head to headend with conventional cable," *Broadcasting*, at 62 (Sept. 18, 1989).

[23]*See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4553 (1991)[hereinafter cited as "*Effective Competition Report*"].

[24]Because the broadcast signal is not being retransmitted under this system configuration, no retransmission consent is necessary. *See infra* note 8.

throughout the wireless cable service area due to terrain shielding, low signal strength or other causes. Where a popular local broadcast signal generally cannot be received by subscribers using off air antennas, the wireless cable operator will pick up the broadcast signal off air at its headend and retransmit that signal over a SHF channel.[25] In either case, the wireless cable system is virtually indistinguishable to the subscriber from a traditional coaxial cable system.

Wireless cable systems are already up and running in approximately 100 different communities across the nation, serving more than 600,000 subscribers.[26] With the recent emergence of the wireless cable industry has come empirical proof that wireless cable systems can compete head-to-head with coaxial cable operations *if they can*

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[25]In the *NPRM*, the Commission inquires as to "whether any distinctions in the manner of applying the retransmission consent provisions are warranted based on whether the entity involved is covered or not covered by the compulsory copyright licensing provisions of the Copyright Act." *NPRM, supra* note 2, at ¶ 42 n. 54. WCA believes not: the reach of the compulsory license is a matter between those who engage in secondary transmissions and copyright holders. With respect to the wireless cable industry, efforts by the Commission to craft rules based on the compulsory license would be particularly problematic. Although the Copyright Office has taken a contrary position, WCA, the Commission and innumerable others have expressed the view that, as a matter of law, wireless cable system operators are entitled to the benefits of the compulsory copyright license under 17 U.S.C. § 111. *See, e.g.* Comments of Federal Communications Commission, Copyright Office RM 86-7B (filed Sept. 9, 1991).

[26]While the wireless success stories are certainly encouraging, they pale in comparison to what wireless could accomplish with fair and equitable access to programming. As Senator Slade Gorton (R-WA) put it: "With any kind of good luck, and reasonable business opportunity, hundreds if not thousands of systems, with millions of subscribers" will be operating in the future. Remarks of Hon. Slade Gorton before The Wireless Cable Association, Inc. (Sept. 12, 1989).

secure fair access to the programming demanded by the public.[27] Wireless cable operators have already proven that they are ready, willing and able to provide consumers with access to independent programming services not carried by vertically integrated coaxial cable systems.[28] Competition from wireless cable systems with access to critical programming has already spurred cable operators to construct their systems rapidly.[29] And, wireless has already been cited as motivating competing coaxial systems to develop marketing plans that result in lower costs to the consumer.[30]

Perhaps most importantly, wireless cable is having a dramatic impact on cable's pricing. For example, *Cable World* recently reported that competition from Cross Country Cable, the wireless cable operator in Riverside-San Bernardino, CA, has forced

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[27]*See* Sims, "'Wireless' Challengers Nipping at Cable Operators," *N.Y. Times*, at D12 (June 12, 1989).

[28]During the infamous 1989 dispute between Cablevision Systems Corp. ("Cablevision") and Madison Square Garden Network ("MSG") during which Cablevision refused to carry MSG, the wireless cable system in New York was the sole provider of MSG to areas of Brooklyn and The Bronx for which Cablevision holds the sole cable franchise. *See* Jaffe, "Wireless operators suggest they can solve cable's political dilemma," *Cablevision*, at 63 (Aug. 28, 1989).

[29]In Detroit, MI, for example, competition from the local wireless cable operator is believed to be largely responsible for completion of the local cable system almost a year ahead of schedule. Similarly, there is no question that a major upgrade of the local cable system in Charlottesville, VA is attributable to the introduction of wireless cable competition.

[30]*See* "Cable's slow to warm up to Dolan clustering plan," *Cable World*, at 4 (July 17, 1989).

an incumbent coaxial cable system to drop the price of a $38.00 package to $29.99.[31] In Bakersfield, CA, cable price reductions attributable to the introduction of competition from wireless cable saved cable subscribers over $5 million in the past year alone. Given the well-documented price sensitivity of cable subscribers,[32] it should not be surprising that cable price reductions generally follow the introduction of wireless cable service to a community.[33]

In reviewing the particulars of the wireless success stories to date, one common thread emerges -- those wireless systems that are most successful are those few that have been able to secure access to the programming services demanded by

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[31]Stump, "Toe to Toe with a Wireless Competitor", *Cable World*, at 28-29 (Oct. 5, 1992.

[32]*See, e.g.* "Study Shows Subs Eager to Switch Ops", *Multichannel News*, at 1 (July 24, 1989); Schley, "Viacom research: Subs aren't forever", *Cable World*, at 1 (Aug. 28, 1989).

[33]*See* "In the Trenches: Cable vs. Wireless, How Do Cable Operators Fight Back Against Price-cutting Competition?", at 13 (Aug. 24, 1992).

consumers.[34] The moral is clear -- wireless cable operators must be able to provide their subscribers with a channel lineup similar to that of the cable competition.

WCA is hardly alone in its view as to what the marketplace demands. Chairman Sikes has acknowledged that "[r]easonable access to programming is an essential ingredient to facilities-based competition in the video services field."[35] Commissioner Quello has observed that "[c]hannel capacity and programming are essential ingredients for wireless cable's ability to compete in the future video distribution marketplace."[36] Commissioner Duggan has voiced similar views.[37] Commissioner Marshall has forthrightly noted that "[a]ccess to desirable programming at fair prices is

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[34]Those wireless systems that have been able to secure access to the critical non-broadcast programming services have done so either through litigation, through Congressional pressure, through the acquisition of long-standing contract rights held by single channel MDS systems or, in a few instances, by securing a cable franchise. When programming is available, it is often on severely discriminatory terms and conditions. For example, the prices paid by wireless operators are frequently many multiples of the prices paid by local cable operators for the identical programming. In addition, wireless operators are frequently "red-lined" -- forbidden to serve areas already wired by cable -- although cable operators who overbuild a wireless system are not forbidden to serve the areas already served by wireless.

[35]Statement of Alfred C. Sikes on FCC Cable Television Policies, Recommendations, and Initiatives Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, at 14 (Nov. 17, 1989)[hereinafter cited as "Sikes Testimony"].

[36]Speech by FCC Commissioner James H. Quello before the Wireless Cable Association's Fifth Annual Int'l Exposition and Conference, at 6 (del. July 28, 1992).

[37]"Inquire Whose Son This Stripling Is . . .", Remarks of Hon. Ervin S. Duggan before the Wireless Cable Ass'n (del. July 23, 1991).

the key to the competitive viability of . . . potential challengers to cable."[38] Little wonder, then, that the Commission's 1990 *Report* to Congress on the state of competition in the cable industry found that "[r]easonable access to programming is important for achieving effective competition among program distributors and fostering maximum possible public choice."[39]

Among the programming that wireless cable operators absolutely must offer subscribers are the local broadcast signals. As noted above, where a broadcaster is unable to deliver a high quality signal throughout the wireless cable service area, wireless cable operators utilize scarce spectrum to retransmit the local broadcaster throughout the service area. For example, Charlottesville Quality Cable Corp., operator of the Charlottesville, VA wireless cable system, retransmits the signals of the NBC affiliate in Charlottesville and the ABC, CBS, Fox and PBS affiliates in Richmond because none of those signals can be received using standard VHF/UHF antennas throughout the wireless cable service area. Choice TV retransmits the Fox network UHF affiliate in Fresno because that broadcaster is located in an area distant from the other UHF stations in the market and cannot be received by approximately 20% of Choice TV's subscribers due to terrain blockage. WJB-TV Ft. Pierce Limited Partnership, operator of a wireless

[38]"Balancing the Power of Cable", Remarks of Hon. Sherrie P. Marshall before the Fed. Communications Bar Ass'n, at 6 (del. Mar. 7, 1990).

[39]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5031 (1990).

cable system in Ft. Pierce, FL, has chosen to retransmit all of the local broadcast signals in its area to assure adequate signal quality for all subscribers.

Wireless cable operators will utilize scarce spectrum to retransmit local broadcast signals that cannot otherwise be received by subscribers for one reason and one reason only -- to satisfy consumer demand. The Senate Committee correctly found that "Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system."[40] In the floor debate over retransmission consent, Congressman Chandler rhetorically asked, "Could you imagine a successful cable company which did not carry local broadcasting to its customers?"[41] The answer, of course, is that such a thing is unimaginable in today's marketplace. Consumers expect that their local multichannel video programming distributor will provide access to local broadcast signals. <u>Indeed, in 1991 when the Commission first adopted a multichannel competition test for determining the presence of effective competition, it specifically acknowledged that a multichannel competitor cannot offer effective competition if its customers cannot receive local broadcast programming</u>![42]

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[40]Senate Report, *supra* note 8, at 35.

[41]138 *Cong. Record* H6493 (daily ed. July 23, 1992).

[42]*See Effective Competition Report, supra* note 23, 6 FCC Rcd at 4553 ("While we do not believe it necessary to include as an explicit condition of the standard that these competitors provide [subscribers] access to local broadcast signals, we
(continued...)

C. WCA's Concern Over The Potential For Abuse Is Based On Past Anti-Competitive Efforts By Cable To Quash Competition.

Given cable's history of quashing competitive threats to its local monopoly, wireless cable's fear that cable will attempt to abuse retransmission consent is well-grounded. As reported by *Forbes*:

> The wired cable companies are dealing with the wireless threat with closed fists. Their ultimate weapon: control over programming, without which the wireless systems will surely wither.[43]

That report was hardly news to the wireless cable industry. That the cable industry retarded the growth of wireless cable by limiting the flow of programming cannot be doubted for an instant. As one wireless system operator has observed:

> cable system operators are using black-mail to stop program suppliers from selling to [wireless cable]. . . . Several [program suppliers] flatly stated they wouldn't do business with [wireless cable] because the cable-TV industry would drop them if they dealt with anybody but cable.[44]

In the past, WCA has presented the Commission and Congress with extensive evidence that programmers were unjustifiably refusing to deal with the wireless cable industry, and

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[42](...continued)
emphasize that it is implicit in our analysis that access to such service is also present and not impeded."].

[43]Meeks, "The Wireless Wonder", *Forbes*, at 60 (Feb. 19, 1990).

[44]Block, "A Cable Cartel?," *Forbes*, at 82 (Feb. 10, 1986).

that evidence need not be repeated here.[45] Suffice it to say that the cable gatekeepers wield enormous economic power over the programming services, even those that are supposedly independent.

As the programming community knows all too well, cable systems have a documented history of manipulating their control over the carriage of programming services in order to advance their own interests. There are myriad reports in the public record of how cable operators have destroyed programming services by refusing carriage,[46] obtained rate concessions by expressly or impliedly threatening to cease

[45]*See* Testimony of James M. Theroux, WCA Regulatory Affairs Chairman, Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Monopolies and Business Rights, at 8-11 (March 17, 1988)(detailing refusals to deal and discriminatory treatment suffered by wireless cable operators); Testimony of Mark Foster, Chairman, The Microband Companies Inc. Before The United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Monopolies and Business Rights, at 14 (March 17, 1988)(reporting that Black Entertainment Television, which is partially owned by TCI, was made available initially for use on Microband's systems in Detroit and New York, but not for use in Washington, where TCI controls the franchised cable system).

[46]In 1984, for example, Music Television ("MTV"), the 24 hour music network, announced that it was raising the rates it charged cable operators. Turner Broadcasting System, Inc. ("TBS") responded by announcing its intention to produce a competing music network that would not charge cable operators. After threatening to back TBS's competing service if concessions were not granted by MTV, TCI took advantage of the TBS announcement to negotiate a new reduced rate, long-term agreement with MTV. TCI's decision to stay with MTV sounded the death knell for TBS's competitive venture. As TCI's John Malone stated afterward, the favorable contract between TCI and MTV "really eliminated the base Ted [Turner] needed." Landro, "Tele-Communications Sets Cable-TV Agenda," *Wall St.J.*, at 6 (Feb. 11, 1986)[hereinafter cited as "TCI Sets Cable Agenda"].

(continued...)

carriage,[47] obtained equity in programmers in exchange for express or implied commitments of carriage,[48] and eliminated competition through express or implied threats to programmers who proposed to distribute through alternative technologies.[49]

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[46](...continued)
Similarly, when National Broadcasting Company ("NBC") was considering the initiation of a news service to compete with CNN, TCI initially supported NBC's plans. However, after CNN made significant price concessions to TCI, TCI announced that it would not carry the planned NBC service. "Without a commitment from Tele-Communications, NBC was unable to get the subscribers needed to proceed with a competing network." *Id.*

As one programming executive complained about his dealings with TCI:

> [w]e always had to back down. It's a simple equation. Without TCI no program channel can survive. Period. They enjoy a feared position in the industry. They are bullies.

See Powell, "Cable's Biggest Leaguer," *Newsweek*, at 40 (June 1, 1988)[hereinafter cited as "Cable's Biggest Leaguer"].

[47]*See id.* Similarly, TCI proved formidable in 1984 when ESPN -- then the nation's largest cable network -- attempted to raise TCI's rates. TCI threatened to drop the service, and ESPN backed down. *See id.*; "Cable Network Programming Universe," *Broadcasting*, at 40 (May 30, 1988).

[48]Because of the monopoly enjoyed by cable operators in their markets, potential programmers are forced "to offer equity stakes to operators to insure carriage." *Id.* It is not surprising that the backers of virtually every new programming service to debut of late have felt compelled to provide equity interests to cable in order to assure carriage. *See id.*, at 41-42; "The Cable Network Programming Universe," *Broadcasting*, at 40 (May 30, 1988); "Cable Operators Make The Equity Play," *Broadcasting*, at 66 (Nov. 23, 1987).

[49]In 1985, for example, TBS, Showtime (neither of which were then owned by TCI) and ESPN ran afoul of TCI when they attempted to compete with TCI by
(continued...)